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State responsibility

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

Argentina

[26 March 1998]

General remarks

Argentina believes that the draft articles represent a very important step in the process of the codification and progressive development of international law. The prospective elaboration of an international convention codifying the legal regime of international State responsibility will complete the codification work that began with the Vienna Convention on the Law of Treaties of 1969.

A fair number of provisions in the draft contain and codify existing customary rules, reflecting State practice and doctrinal and judicial interpretation. In that respect, the articles constitute an extremely valuable guideline, which Argentina will take into account in cases where questions of international responsibility must be addressed.

The draft also contains other rules which could constitute a progressive development of international law, as they do not reflect the general practice of States up to this point.

...

With regard to the general economy of the draft, Argentina is also of the view that the Commission should, on second reading, strive to maintain a close harmonization between the codification of this topic and that of the other two related topics that are currently also under consideration, namely, so-called international liability for injurious consequences arising out of acts not prohibited by international law, and diplomatic protection. Indeed, it seems advisable for the regime of international responsibility to be dealt with as a whole, and for all of its aspects to be worked out with the greatest possible coherence and conceptual clarity.

Part One
Origin of international responsibility

Argentina considers that part one of the draft, concerning the origin of international responsibility (articles. 1-35), ... adequately codifies the basic rules of responsibility and outlines the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

Chapter I. General principles

Article 3. Elements of an internationally wrongful act of a State

This characterization of an internationally wrongful act,[1] which relies on two elements (one subjective – the attribution of an act to the State – and one objective – the fact that the act constitutes a violation of international law), does not expressly include the element of *damage* caused as a result of the State's conduct to the detriment of the subject whose subjective right has been impaired.

While a large section of public-law doctrine holds that a reference to damage is obligatory,[2] the Commission did not regard the mention of damage as an essential condition for the existence of an internationally wrongful act.[3]

In this connection it is believed that the characterization formulated by the Commission deserves careful analysis. While it is indeed true that there are various international instruments which create obligations not between States, but between a State and its own subjects (namely, the international human rights protection treaties), it is also true that violations of those instruments have a special prevention and punishment regime (namely, the international human rights protection mechanisms) and do not necessarily give rise to a claim by one State against another.

Nevertheless, in the case of a wrongful act caused by one State to another, which would appear to be the *ratio legis* of the draft, the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim.

In a similar vein, it has been stated that even in the human rights protection treaties, in which a legal relationship is established between a State and the individuals under its jurisdiction, the damage requirement cannot be denied. What is involved is actually a moral damage suffered by the other States parties.[4]

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[1] In 1972, at the prompting of the Special Rapporteur, Mr. Roberto Ago, there was a change in the Commission's concept of the international responsibility of the State. Up to the 1960s, State responsibility had been viewed essentially as relating to the protection of aliens. Ago's writings gave rise to a new concept, which is regarded as the fundamental basis of international responsibility: the violation by a State of its obligations towards other States and the international community as a whole.

[2] It has been stated in this connection that "the breach of an international obligation is a necessary but not sufficient element in the case of international delicts. For the purposes of establishing an automatic responsibility link between the acting State and the claimant State, there must be an additional requirement: the damage suffered by the claimant State." Eduardo Jiménez de Aréchaga, *Derecho Internacional Público*, second edition (Montevideo, Fundación de Cultura Universitaria, 1991), vol. VI, p. 35.

[3] The Commission has stated that:

> "International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For examples we need only turn to the conventions on human rights or the majority of the international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity." *Yearbook of the International Law Commission, 1973*, vol. II, document A/9010/Rev.1, chap. II.B, para. (12) of the commentary to article 3.

[4] "In the case of a violation of the human rights treaties, the damage sustained by each of the other States parties is a moral damage, which consists of the impairment of its interest in ensuring that the treatment of individuals in all States in the region adheres to the stipulated norms." Jiménez de Aréchaga, op. cit. (footnote 3).

It has also been stated that the damage requirement is, in reality, an expression of the basic legal principle which stipulates that no one undertakes an action without an interest of a legal nature.[5]

The foregoing indicates that it would be advisable for the Commission to reconsider the non-inclusion of the damage requirement in article 3 of the draft from the standpoint of the object and purpose of the article.

Chapter III. Breach of an international obligation

Article 19. International crimes and international delicts

The distinction between international crimes and international delicts deserves to be analysed from two different standpoints: conceptual and nominal. One question is whether, from the substantive point of view, different regimes should be envisaged to regulate the consequences of various categories of violations of the law of nations, and another question is whether both categories can be called "crimes" and "delicts", respectively, using penal terminology.

With regard to the substantive issue, it seems clear that the distinction has a legal basis. Indeed, the consequences of an internationally wrongful act cannot be the same where that act impairs the general interests of the international community as where it affects only the particular interests of a State.

A strong current of opinion has emerged since the Second World War which holds that general international law envisages two entirely different kinds of responsibility regime. The first applies in the case of a violation by a State of rules whose observance is of fundamental importance to the international community as a whole (refraining from acts of aggression, the perpetration of genocide, the practice of apartheid, etc.). The second applies, on the other hand, in cases where the State has only failed to comply with a less important and less general obligation.

In the Commission's view, there are three circumstances which could constitute proof of the existence of such a dual regime: (a) the existence of a special category of rules characterized as "peremptory" or deriving from *jus cogens*; (b) the punishable nature of acts committed by individuals acting as State organs who by their conduct have violated international obligations; (c) the fact that the Charter of the United Nations attaches specially determined consequences to the violation of specific international rules (namely, Chapter VII).[6]

Argentina deems it fitting that the Commission recognized the existence of this distinction based on the gravity and scope of the violation by a State of its obligations. In this respect, it believes that a violation of international law that affects the international community as a whole should have effects commensurate with the seriousness of the wrongful act.

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[5] In this connection, it has been stated that the damage suffered by a State is always the element "that entitle[s] one State to make a claim against another and demand redress" (statement by Mr. Sette Câmara, *Yearbook ... 1973*, vol. I, 1205th meeting, para. 43).

[6] *Yearbook ... 1976*, vol. II, chap. III.B.2, para. (16) of the commentary to article 19.

Accordingly, it is desirable that the Commission should, on second reading, analyse and elaborate as precisely as possible the different treatment and the different consequences attaching to different violations in accordance with this distinction.

With regard to the nominal question, however, Argentina cannot help but express doubts regarding the terminology used (referring to those violations which affect the international community as a whole as "crimes" and to others as "delicts").

In this respect, it should be noted that the adoption of a vocabulary which might be termed "penal-law" or "criminal-law" does not appear to reflect the nature of State responsibility. Indeed, the nature of international responsibility is such that, while it cannot be compared with civil liability, still less can it be compared with criminal responsibility.

The foregoing has even greater relevance at present, when we are witnessing a growing process of the progressive development of international criminal law, as demonstrated by the establishment of the International Tribunals for the former Yugoslavia and for Rwanda, the elaboration by the Commission of the draft Code of Crimes against the Peace and Security of Mankind and, in particular, the work of the Preparatory Committee on the Establishment of an International Criminal Court.

In this context, in which the international legal order tends to draw a clear distinction between the *international responsibility of the State* and the *international criminal responsibility of individuals*, it does not seem advisable to apply to the former a terminology appropriate to the latter, as that would lead to misunderstandings.[7]

Part Two
Content, forms and degrees of international responsibility

Chapter I. General principles

Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act

Argentina considers that ... chapters I and II of part two, concerning the content, forms and degrees of international responsibility (articles 36-46), adequately codify the basic rules of responsibility and outline the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

[7] In this respect, it has been stated that:

"Neither civil nor criminal, but partaking of both, international responsibility has its own features and cannot be compared with the categories of domestic law, since the society of States has little to do with the international community. From this standpoint, the terms 'crimes' and 'delicts' adopted by the Commission are particularly ill-chosen." Alain Pellet, "Vive le Crime! Remarques sur les degrés de l'illicité en droit international", in *International Law on the Eve of the Twenty-first Century* (New York, 1997), pp. 302-303.

Chapter III. Countermeasures

The provisions dealing with countermeasures (articles 47-50) ... contain certain innovative elements which merit the comments set forth below.

In its general commentary on chapter III, the Commission characterizes countermeasures as "unilateral measures of self-help". They "take the form of conduct, not involving the use or threat of force, which – if not justified as a response to a breach of the rights of the injured State – would be unlawful as against the State which is subjected to them".[8]

The Commission, while maintaining that countermeasures "should not be viewed as a wholly satisfactory legal remedy, ... because of the unequal ability of States to take or respond to them", adds, however, that:

> "[r]ecognition in the draft articles of the possibility of taking countermeasures – warranted as such recognition may be in the light of long-standing practice – ought accordingly [to] be subjected to conditions and restrictions, limiting countermeasures to those cases where they are necessary in response to an internationally wrongful act".[9]

In this connection, it is believed that, while countermeasures have been applied on various prior occasions, the taking of countermeasures has several aspects which may be regarded as questionable:

(a) their lawfulness or unlawfulness is, in many cases, very difficult to determine;

(b) the countermeasure adopted is not always proportional to the nature of the wrongful act committed by a State;

(c) the affected State is generally incapable of making an objective judgement of the lawfulness or unlawfulness of an act committed by another State;

(d) as affirmed by the Commission itself, the capacity of States to take countermeasures or to respond to them is very unequal, depending on the resources at their disposal.

In a similar vein, article 48 (Conditions relating to resort to countermeasures) provides that the injured State, in fulfilling its obligation to negotiate, is entitled to take "interim measures of protection which are necessary to preserve its rights" (para. 1).

In its commentary, the Commission characterizes "interim measures of protection" as inspired by "procedures of international courts or tribunals which have or may have power to issue interim orders", and uses as an example the freezing of assets.[10]

The Commission considers that a feature of "interim measures of protection" is that "they are likely to prove reversible should the dispute be settled". In this connection, the Commission adds: "the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation."[11]

Argentina is of the view that, while it is true that the practice of taking countermeasures or reprisals has been common in conflict relations between States, it is

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[8] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.D.2, para. (1) of the general commentary to chapter III.

[9] Ibid.

[10] Ibid., para. (4) of the commentary to article 48.

[11] Ibid.

also true that, at the current stage in the evolution of the international community, countermeasures should be considered only as a last resort, once the various methods of peaceful settlement of disputes, and above all the obligation to negotiate, have been exhausted.

The taking of countermeasures should not be codified as a *right* normally protected by the international legal order, but as an act merely *tolerated* by the contemporary law of nations, and thus comparable to what is termed a "state of necessity" in domestic law.

In this connection, it is appreciated that the option of taking countermeasures is not only granted in a general way to States, but is, in addition, strengthened by the option of taking the aforesaid "interim measures of protection". The latter would appear to differ from countermeasures not in their nature but in their degree or duration.

In the light of the foregoing, it would be extremely useful for the Commission, in its second reading of the draft articles, to reconsider carefully the provisions dealing with countermeasures. It might be possible to reverse the presumption of the lawfulness of countermeasures by providing that, while States do not have a right to take them, in certain cases, under circumstances of exceptional gravity, their use is not unlawful.[12]

Article 48. Conditions relating to resort to countermeasures

Paragraph 1

[See part two, chapter III, and article 58.]

Part Three
Settlement of disputes

The provisions dealing with ... settlement of disputes (articles 54-60) contain certain innovative elements which merit the comments set forth below.

Article 58. Arbitration

Paragraph 2

The part of the draft articles which refers to the settlement of disputes is closely related to the taking of countermeasures, and it is in that connection that we wish to make comments on it.

Article 58, paragraph 2, provides that:

[12] Moreover, the judicial precedents do not provide an unequivocal solution. In the arbitral award in the *Naulilaa Accident* case, it was stated that a reprisal is unlawful if it is not preceded by a fruitless claim exercised by the State which has suffered the violation. The arbitral award of 9 December 1978 in the case concerning the *Air Services Agreement of 27 March 1946 concluded between the United States of America and France* admitted the possibility of adopting certain countermeasures before an impartial dispute settlement mechanism exists.

"where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, *the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal* to be constituted in conformity with annex II to the present articles". (emphasis added)

In this connection, it is believed that, in the Commission's scheme, the main limitation of countermeasures arises precisely from the compulsory arbitration scheme provided for in the draft articles. Such a solution requires careful consideration.

Compulsory arbitration would be extended to virtually all areas of international law, since the draft seeks to establish a general and comprehensive solution to the legal problems deriving from the international responsibility of the State.[13]

In this connection, it is necessary to consider the degree of universal acceptance which the compulsory arbitration scheme proposed by the Commission would have. Indeed, if that solution failed, the option of resorting to countermeasures would lose its main check and balance. Countermeasures and compulsory arbitration should be regarded as two sides of the same coin.

For that reason, it would be advisable for the Commission to reconsider these aspects, bearing in mind that the regime of countermeasures could be reformulated and that the compulsory arbitration scheme provided for in the draft articles could be made more flexible.

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[13] In this connection it should benoted that, in a part of the commentary on article 58, paragraph 2, the Commission states that "this dispute, in its turn, may include not only issues relating to the *secondary* rules contained in the draft articles on State responsibility, but also the *primary* rules that are alleged to have been violated" (emphasis added). *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), chap. IV.C, para. (5) of the commentary to article 5.

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Addendum

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II. Comments and observations received from Governments

Italy

[4 May 1998]

General remarks

Italy wishes first of all to commend the members of the International Law Commission, particularly those who have acted as special rapporteurs, for their excellent work on the draft articles on State responsibility. The draft articles adopted by the Commission on first reading would appear already to represent a very good basis for discussion at an international conference to adopt an international convention on the subject.

Italy's observations concern the following points:

- The scope of the draft;
- The issue of whether damage is an element of an internationally wrongful act;
- The issue of the distinction between international crimes and international delicts.

Italy reserves the right to submit specific comments on parts two and three of the draft at a later date.

In the Italian Government's view, the draft articles should cover determination of the conditions to be met for an internationally wrongful act committed by a State to exist, the legal consequences of such an act and the settlement of disputes concerning such acts.

Part One
Origin of international responsibility

Chapter I. General principles

Article 3. Elements of an internationally wrongful act of a State

In the Italian Government's view, damage should not be included among the elements of an internationally wrongful act.

Under international law, the breach of a legal obligation by a State necessarily involves the injury of a corresponding subjective right of another subject (or several other subjects) of international law. This other subject does not have to demonstrate that it has in addition suffered material or moral damage in order to be able to assert that an internationally wrongful act has been committed against it and that the wrongdoing State bears responsibility for that wrongful act. The injury of its subjective right suffices. Naturally, the content of the wrongdoing State's responsibility will be the same only where there has been material or moral damage.

Affirming that a wrongful act exists and that there is State responsibility only if the breach of the obligation attributable to the State has caused damage to another subject would be tantamount to saying, for example, that the violation by a State of another State's

territory, or the adoption by a State of legislation that it had undertaken not to adopt, do not represent wrongful acts if they do not cause material or moral damage. What is more, in the case of obligations concerning the way in which States must treat their citizens, the State that breaches such obligations would not be committing an internationally wrongful act because there would be no State (or other subject of international law) that has suffered material or moral damage.

In fact, even those – ever fewer in number – who assert that damage is a condition for the existence of an internationally wrongful act do not draw such a conclusion. They affirm that damage has occurred in the cases in question, and they speak of legal damage in that connection. However, as the Commission indicated in its commentary to draft article 3, there is no point in referring to damage as being a subsequent element of a wrongful act, which would follow a breach of an obligation, since any breach of an international obligation involves legal damage and such damage is sufficient to establish the existence of a wrongful act and the responsibility of the wrongdoing State.

Those who now insist that damage should be included as an element of an internationally wrongful act are actually motivated by a different concern, i.e. the concern that failure to mention damage as an element of an internationally wrongful act would, where there is a breach of a given obligation, allow any member of the international community to invoke the existence of a wrongful act and the responsibility of the wrongdoing State. This concern is not well founded, however. The fact that damage is not regarded as an element of a wrongful act does not mean that all States may invoke the responsibility of the wrongdoing State. Only the State or States whose subjective right has been injured may do so, i.e. those in respect of which an obligation has been breached. What is at issue, therefore, is identifying the injured State, a subject that is dealt with in draft article 40. Unquestionably, in the case of the breach by a State of an obligation under a bilateral treaty, only the other State party to the treaty will have an injured subjective right and consequently only that State will be able to invoke the responsibility of the wrongdoing State. In the case of the breach of obligations under customary international law or under a multilateral treaty, identification of the injured subject is more complex, but it is clear that the breach of most obligations does not entail the injury of the subjective rights of all the States addressed by the norm containing the obligation (i.e., in the case of customary international law, all members of the international community and, in the case of a multilateral treaty, all States parties to the treaty). Only in instances where there are norms laying down *erga omnes* obligations (or *erga omnes* participants) will all States (or all States parties to the treaty) be able to claim that a subjective right has been injured and consequently invoke the responsibility of the wrongdoing State. It is therefore necessary to establish whether such norms exist – a matter dealt with in draft article 40 – and, if so, what the norms in question are; the issue is not whether damage is a prerequisite for the existence of an internationally wrongful act. Furthermore, if the concept of damage is regarded as including legal damage, asserting that damage is an element of a wrongful act is insufficient to preclude the existence of obligations whose breach gives rise to responsibility with respect to all States. In fact, in the case of the breach of what are referred to as *erga omnes* obligations, all States addressed by the norm should be regarded as having had a subjective right injured and, consequently, as having suffered legal damage.

Chapter III. Breach of an international obligation

Article 19. International crimes and international delicts

Italy already indicated during the discussions in the Sixth Committee that it endorsed the choice made by the International Law Commission to distinguish, within the category of internationally wrongful acts of States, a category of more serious wrongful acts which it terms "international crimes", entailing a different (or partially different) responsibility regime from the one attaching to all other wrongful acts (which it terms "international delicts"). Italy is aware that the distinction made by the Commission in article 19 of the draft has raised objections on the part of many States. Nevertheless, Italy is still of the opinion that this distinction should be made.

In Italy's view, existing international law affords to certain basic interests of the international community a protection different from that afforded to other interests. This different protection, which is apparent, for example, in the regime governing causes of invalidity or termination of treaties (conflict with a *jus cogens* rule) and the one on individual responsibility of persons acting in an official capacity (punishability of persons acting in an official capacity who have committed war crimes, crimes against peace or crimes against humanity), is also apparent in the State responsibility regime.

Existing customary law already provides that the violation of certain obligations which protect the fundamental interests of the international community simultaneously infringes the subjective rights of all States and authorizes all of them to invoke the responsibility of the State which violated the obligation: these are what the International Court of Justice has termed "*erga omnes* obligations". The prohibition against armed aggression is the most important example of this category of obligations; it is not only the State which is the direct victim of the aggression that is injured: all States are injured, and can invoke the responsibility of the State committing the aggression. This is not true of the vast majority of obligations laid down by the rules of international law, including those laid down by customary rules.

...

The formula used by the Commission in article 19 of the draft to designate the wrongful acts included in the category of international crimes was criticized by many States. In Italy's view, however, even if the formula may appear somewhat complicated, it has a number of positive aspects.

The first positive aspect of this formula is that it does not give rise to a "crystallization" of international crimes. To this end, instead of drawing up a precise list of the wrongful acts that were to be regarded as international crimes at the time when the draft was prepared, the Commission preferred to indicate the criteria which should guide the interpreter in determining the wrongful acts to be characterized as international crimes at a given moment. Italy understands the reasons which led the Commission to use as its basic criterion the criterion adopted in the Vienna Convention on the Law of Treaties for designating rules as belonging to *jus cogens*, namely, a "*renvoi*" to the international community as a whole. The Commission specified, in its commentary to article 19, that it had meant thereby to indicate that a given wrongful act must be regarded as a wrongful act entailing special legal consequences not only by one or another group of States (even a majority group), but by all the basic components of the international community. To envisage the same method for designating the two categories of rules (rules which cannot be derogated from by special agreement and rules establishing obligations whose violation

represents an international crime) is an acceptable solution, but as what is involved is an even trickier matter than *jus cogens*, subsequent clarifications are needed to determine what international crimes are. The Commission has chosen the route of providing examples that can serve as a guide for the interpreter who would be responsible for determining whether, at a given moment, a wrongful act is considered to be an international crime by the international community as a whole. The list of categories of wrongful acts which could, in accordance with article 19, include international crimes is, in Italy's view, still valid nowadays, even though over 20 years have elapsed since the adoption of that article.

These are the positive aspects of the formula adopted. Nevertheless, the decision not to draw up a full list of international crimes makes it all the more necessary that the determination of whether an international crime has been committed in a specific case should be entrusted to an impartial third party, as the former Special Rapporteur had proposed. The Italian Government reserves the right to submit comments on this subject in dealing with the articles in parts two and three.

Part Two
Content, forms and degrees of international responsibility

Chapter I. General principles

Article 40. Meaning of injured State

See article 3.

Chapter III. Countermeasures

With respect to the *legal consequences of an internationally wrongful act committed by a State*, Italy considers it of the greatest importance that the draft should deal not only with what are referred to as "substantive" consequences, i.e. new obligations for a wrongdoing State, but also *countermeasures* that may be taken against such a State, and the conditions relating to resort to countermeasures.

Notwithstanding the theoretical reasons stated by the Commission in the commentary to draft article 1, which prompt Italy to opt for a broad concept of international responsibility rather than one confined to new obligations for the wrongdoing State, the Italian Government believes that it is of the utmost importance that the countermeasures regime (for example, conditions relating to resort to countermeasures, and prohibited countermeasures) should be codified. It is particularly important to establish clearly the content of the rules of international law with respect to the consequences of a wrongful act, so as to prevent abuse on the part of States. In a specific case new obligations for a wrongdoing State are determined by agreement by the injured State and the wrongdoing State, or by a third party (an arbitrator, for example), whereas the decision to adopt countermeasures and as to their content is normally taken on the basis of a unilateral decision by the State taking the measures (which, of course, does not mean that the State taking the measures may judge its own case but, rather, that it "takes the risk" of taking countermeasures whose lawfulness could subsequently be challenged). It is therefore most important that the content of the rules of international law concerning countermeasures should be clearly established.

Chapter IV. International crimes

Italy believes that the draft should deal with *the responsibility of States for particularly serious wrongful acts* (referred to as "international crimes" in the draft), and not only responsibility for "ordinary" wrongful acts (referred to as "international delicts" in the draft). For the reasons indicated below, in section III, Italy believes that certain particularly serious wrongful acts already entail legal consequences other than those of wrongful acts in general. Such special consequences should not be determined on the basis of customary law alone. Moreover, it might be advisable to include in the draft provisions to complement and enhance the regime that currently exists under customary law. Italy therefore does not share the view that the legal consequences of the most serious wrongful acts should be excluded from the draft articles on State responsibility.

...

Existing customary law provides for certain differences in the content of the legal consequences which injured States can invoke. Thus, for example, in the case of armed aggression, unlike in the case of any other wrongful act, injured States can adopt measures of self-defence entailing the use of force. Other differences begin to emerge in the framework of the reparation owed by the State committing the wrongful act, particularly with regard to the content of satisfaction and guarantees of non-repetition of the wrongful act.

In Italy's view, the differences envisaged in international law in the responsibility regime for wrongful acts which adversely affect the fundamental interests of the international community should appear in the draft. At the same time, these differences should be developed and integrated in the light of the need to make the responses to such acts more effective and to prevent abuse. The trickiest questions concern: (a) the need to find a criterion for ensuring coordination between the individual reactions of injured States, and (b) the need to envisage a system for deciding that such an act has been committed in a specific case. An interesting proposal on that subject had been put forward by the former Special Rapporteur, but it was not adopted by the Commission. Nevertheless, the Commission should continue its work on these questions and submit to States other proposals in this regard, with a view to a possible codification conference in the future.

A failure to deal in the draft articles on State responsibility with the legal consequences arising out of internationally wrongful acts which adversely affect the fundamental interests of the international community can have only two aims: (a) to assert that such acts entail the same responsibility regime as any other wrongful act, or (b) to leave it to customary international law to determine the existence of such acts and the special regime attaching thereto. In Italy's view, neither of these aims is acceptable. Italy believes, as stated above, that customary international law already provides for differences in the regime of State responsibility, particularly as regards the subjects entitled to invoke it. To deny the specificity of the responsibility regime for the acts in question would be a step backward in terms of existing law and not a codification effort. Not to deny the existence of a special responsibility regime for certain particularly serious wrongful acts, but to leave it to customary law to decide that they have been committed, seems to Italy to be equally unacceptable, because it is precisely in this area that an effort to clarify and, where necessary, integrate existing rules is needed.

It follows from the foregoing that the special responsibility regime for wrongful acts adversely affecting the fundamental interests of the international community to which Italy is referring is not a regime of the criminal type like the one provided for in the domestic

law of States. The Commission, moreover, was always careful to state that in using the expression "international crimes" to designate wrongful acts of States entailing a special responsibility regime it never had any intention of attaching to the acts in question the types of responsibility peculiar to domestic law. The consequences currently attached to international crimes in articles 52 and 53 of the draft do not resemble the criminal penalties known to domestic law. Therefore, the use of the expression "international crimes", which has aroused so many concerns and objections on the part of a number of States, does not raise any problems for Italy, which views it solely as a concise way of referring to the most serious internationally wrongful acts (the same applies to the term "international delict", which is used to designate less serious internationally wrongful acts). Nevertheless, should the Commission deem it appropriate, in order to overcome certain objections, to use another term to designate the most serious internationally wrongful acts, Italy would have no objections.

Part Three
Settlement of disputes

Italy believes that the draft should include a part dealing with the *settlement of disputes*. A convention on the international responsibility of States must be accompanied by dispute-settlement provisions concerning the interpretation and implementation of the convention. The basic link between rules on internationally wrongful acts and their legal consequences, on the one hand, and the regime for the settlement of disputes concerning such acts, on the other hand, means that it is preferable, if not necessary, for the dispute-settlement rules not to be drawn up directly by the future conference itself, which may be called upon to adopt a convention on State responsibility. It would be particularly difficult to discuss rules on countermeasures and on international crimes and their consequences without knowing at that point what the dispute-settlement regime was to be. Italy therefore shares the view that the Commission's draft should contain a part dealing with the settlement of disputes.